

APR 19 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DELSON FRANCIS SAM,

Defendant - Appellant.

No. 04-10535

D.C. No. CR-02-01769-JMR

MEMORANDUM^{*}

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

DELSON FRANCIS SAM,

Defendant - Appellee.

No. 04-10570

D.C. No. CR-02-01769-JMR/JJM

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted April 6, 2006
San Francisco, California

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: SCHROEDER, Chief Judge, TROTT and KLEINFELD, Circuit Judges.

Sam appeals his 41-month sentence resulting from his conviction of two counts of assault on a federal officer. The government appeals the sentencing judge's decision not to apply the official victim enhancement pursuant to U.S.S.G. § 3A1.2.

The district court did not commit impermissible double counting. Double counting is authorized when it is “possible to be sentenced under a particular offense guideline without having engaged in” the behavior used to enhance the offense level.¹ The Guidelines section in this case, § 2A2.2, is applicable for assaults with and without a dangerous weapon.² Because it was not “impossible”³ to come within the aggravated assault guideline without a dangerous weapon,⁴ using the dangerous weapon to both determine the offense level and apply the enhancement was not double counting under controlling circuit precedent. If the

¹ United States v. Archdale, 229 F.3d 861, 869 (9th Cir. 2000).

² U.S.S.G. § 2A2.2 (2004).

³ United States v. Reese, 2 F.3d 870, 895 (9th Cir. 1993).

⁴ U.S.S.G. § 2A2.2 application note 1 (2004).

district court concludes on resentencing that the use of the pick-up truck was in fact the only reason for both enhancements, then it can take that into account under Booker when fashioning a reasonable sentence.⁵

Counts can be grouped under U.S.S.G. § 3D1.2(a) only when they “involve the same victim.”⁶ Sam was convicted for one count of assault per Border Patrol Agent, so the court could not group the offenses under § 3D1.2.

Because the district court sentenced Sam after Blakely⁷ and before Booker, it concluded that the official victim enhancement could not be applied. This subsequently became plain error when Booker was decided, so we vacate Sam’s sentence and remand for re-sentencing. We need not reach the denial of downward departure issue because the entire sentence is vacated and the case is remanded for re-sentencing.

VACATED and REMANDED.

⁵ United States v. Booker, 543 U.S. 220, 261-262 (2005).

⁶ U.S.S.G. § 3D1.2(a) (2004).

⁷ Blakely v. Washington, 542 U.S. 296 (2004).